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(VENICE COMMISSION)

COMMENTS ON THE DRAFT LAW ON AMENDMENTS TO THE CONSTITUTION OF UKRAINE CONCERNING THE PROKURATURA[1]

by

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[1] *Draft Law prepared by the General Prosecutor's Office.*

1. The general aim of proposing the new amendments to the Constitution of Ukraine is described in the Explanatory Note., ie. “the necessity of assigning constitutional status to the Public prosecution of Ukraine in line with international principles and standards regarding the role and place of the public prosecution in a democratic society with the view to historical tradition, real state of national and social development of Ukraine”.

The first part of the sentence is very clear. It is an obligation imposed on each of the member states of the Council of Europe to reform all the institutions in such a way as to be in line with the European standards existing in a democratic society. Some doubts arise however when reading the second part of that sentence which says that the status of Public prosecution of Ukraine should be in line with historical tradition of Ukraine. The historical tradition of the prosecutor’s office in Ukraine goes back to the soviet system, to the system of “prokuratura” which does not seems to be the most suitable model to be followed to achieve the goal or creating a democratic prosecutor’s office.

2. *The draft Law on Amendments to the Constitution of Ukraine proposes revising Art. 121-123*

Art. 121 is crucial for describing Public Prosecution’s place in the system of state organs in Ukraine. There are two fundamental principles of organisation of the Public Prosecution: independence and link with judiciary authority. Public Prosecution is defined as a unified independent system of judiciary authority. This formulation of art. 121 is new and more precise than the formulation of 1996 Constitution. It is clear that the Prosecutor office does not create a separate (fourth) pillar of the state organs as existed previously in the soviet system. In Ukraine’s situation this solution is much more preferable because it diminishes a danger of returning to the system of "prokuratura". The new proposal indicates also that a model has been chosen which separates the public prosecution from the executive authority.

Individual states have great leeway in regulating the position of the prosecutor office in the state system of organs. The prosecutor's office may be closely linked to the executive authority or it can be completely separated from the executive power and together with the judiciary constitute a joint magistrature, which in post communist countries seems to be a more widespread model. Both models are accepted in democratic society. Ukrainian authority has decided to establish prosecution as a part of the judiciary power. For that reason, a general constitutional solution of art. 121 does not raise any critical comments. That article however creates only a base for detailed regulations in ordinary law concerning the relations between courts (judges)and prosecutors as well as scope of independence of the public prosecution. And the detailed regulations will give answers on the scope of democratisation of the prosecutor's office in Ukraine.

Art. 121 also defines the functions performed by the Public Prosecution. There are as follows:

1) criminal prosecution in pre-trial proceedings and prosecution in court on behalf of the State;
2) protection of human and citizen’s rights and freedoms, state and public interest, as well as the representation of their interests in court as prescribed by law;
3) supervision over observance of laws by authorities conducting criminal and pre-

trial investigation;

4) supervision over observance of laws by authorities and institutions in execution of judgments, as well as in application of the measures of coercion related to the restraint of personal liberty of citizens.

There is one very positive solution, namely that the Public Prosecution is deprived of the very general function of general supervision over observance of laws by other organs, authorities and institutions. It shows that the model of prosecutor's office proposed by current amendments intends to break with the model of soviet prokuratura.

Some doubts arise however as far as the new wording of the art. 121 is concerned. One is given an impression that some functions of the prosecutor which have been criticised in previous opinions of the Venice Commission (Opinion on the draft Law Amending the Law of Ukraine on the Office of the Public Prosecutor (CDL(2004)083) now are included in the art. 121.

3. *Art. 121 p. 2*

The right of the prosecution defined in Art. 121 p. 2 as "protection of human and citizen's rights and freedoms, state and public interest" is going too far. The power to represent the public and assert rights on their behalf is too widely drawn. I would like to revoke the Venice Commission Opinion (CDL(2004)083), p.5: " *It is recommended that this representation should be limited to cases where the public interest is involved and where is no conflict with the fundamental rights and freedoms of the individual. It is up to the individual himself to decide whether to ask State assistance or not"*. The similar "warning" concerning non-penal law responsibilities of public prosecutors one can find in the PACE' Recommendation 1604(2003) on the role of the Public Prosecutor's office in democratic society: *"as to non-penal law responsibilities, it is essential that any role for the prosecutors in the general protection of human rights does not give rise to any conflict of interests or act as a deterrent to individuals seeking state protection of their rights."* The general protection of human rights is not a sphere of activity of the prosecutor's office. It is best dealt with by ombudsman rather than by prosecutor's office. Taking this into account I am of the opinion that art. 121 p. 2 should be redrafted and the right of prosecutors should be limited. The part of this article referring to "protection of human and citizen's rights and freedoms" should be deleted.

4. *Art. 121 p. 4*

One is given an impression that the supervisory power of prosecution is wider defined than in the 1996 Constitution. The draft amendments state that Prosecution is entrusted with "supervision over observance of laws by authorities and institutions in execution of judgments". This formulation enlarged the role of the prosecution to execution of judgments in different kinds of cases not only in criminal ones as is the case of the 1996 Constitution. It is a reminiscent of the previous system of general supervision power of the prosecutor office. This kind of general, constitutional provision could open the way to the revival on a large scale of the supervisory power of the prosecutor office by ordinary law. Such a wide power of prosecutor office, as has been stated in a previous opinion of the Venice Commission is unacceptable in a democratic state of law.

5. *Art. 122*

This article regulates the problem of appointment and dismissal from the office of the Prosecutor General of Ukraine. Generally one can accept the new provisions positively. They are in line with democratic standards. The new par. 2 defines the necessary conditions for being appointed as Prosecutor General of Ukraine. There are no objections to such regulation.

In the new par. 3 the term of power of the Prosecutor General is prolonged to 7 years. One can agree that this longer term diminishes the danger of politisation of the office of Prosecutor and could be one of the guarantees of his/her impartiality. For that reason I find this solution as a step leading in the right direction.

As a positive change one can find the abolition of the right of Verkhovna Rada to express no confidence in the Prosecutor General. This competence as it has been rightly stressed in their Explanatory Note disrupts the balance of constraints and integrity between different types of state authority.

As far as the pre-term dismissal of the Prosecutor General the qualifying majority is a good solution. I am however of the opinion, that the conditions for such a dismissal should instead be provided by constitution. It would be a better guarantee of the independence of the prosecutor office.

6. *Revised p. 9 "Transitional Provisions"*

The new draft proposes keeping part of the Transitional Provisions concerning the performance by Public prosecution of the function of pre-trial investigation unless the system of pretrial investigation is formed. This kind of provision is necessary in the situation when the new system of pretrial investigation is not yet introduced.